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Supreme Court of the United States

OCTOBER TERM 1955

No. 21

UNITED STATES OF AMERICA, PETITIONER,

versus

TWIN CITY POWER COMPANY AND WILLIAM P. DAUCHY, ITS MORTGAGEE, RESPONDENTS

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R.138-148) is reported as *United States v. Twin City Power Company*, 215 F. 2d. 592. The District Court for the Western District of South Carolina filed three opinions. The first on the motion of the United States to strike certain defenses (R. 1-14) is reported as *United States v. 1532.63 Acres*, 86 F. Supp. 467, the second confirming the Commissioners Report (R. 47-55) is reported as *United States v. 3928.09 Acres*, 114 F. Supp. 719, and the third, overruling a motion for a new decree (R. 55-58), is unreported.

JURISDICTION

The judgments of the Court of Appeals were entered on August 30, 1954 (R. 149, 151, 153). The jurisdiction of

opment was only the first of eight (8) hydro-electric developments planned on the upper Savannah River, none of which contained any provision whatever for navigation facilities.

The Clark Hill dam was authorized by Section 10 of the Flood Control Act of 1944 (Public Law No. 534, 78th Session of Congress, Chapter 665, 2nd Session, approved December 22, 1944).

That Act is entitled:

"AN ACT

"Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes."

This statute in Section 10 approved the development of thirty-eight river basins in various parts of the country. Many of these proposed basin developments included within themselves several projects. In Section 11 preliminary studies for many other basins were authorized, and in Section 13 projects primarily for soil-erosion prevention were adopted.

The Clark Hill project is authorized by the following paragraph in Section 10 of the Act:

"Savannah River Basin

"The general plan for the comprehensive development of the Savannah River Basin *for flood control and other purposes recommended by the Chief of Engineers in House Document Numbered 657, Seventy-eighth Congress, Second Session*, is approved and the construction of the Clark Hill Reservoir on the Savannah River in South Carolina and Georgia, is hereby *authorized substantially in accordance with the recommendations of the Chief of Engineers* in that report at an estimated cost of $35,300,000."[3]

[3] The total cost of Clark Hill is now estimated as $77,000,000. Hearings House Sub-Committee Appropriations, Civil Functions Dept. Army 1953, p. 320.

It will be noted that no mention is made of navigation in this authorization and that the reference is not to a river *channel* for navigation but to a river *basin*, connoting the gathering of water falling upon a land area. The "general plan" for the development of the Savannah Basin approved in the Act is that recommended by the Chief of Engineers May 27, 1944, and published as H. D. 657. Because of the insistence of the Government that Clark Hill is a navigation improvement entitling it to take Twin City lands without compensation, we quote liberally from this report to demonstrate that the development is primarily for the production of hydro-electric energy and that the benefits, if any, to navigation are small and incidental.

Portions (pp. 3-6) of that report are as follows:[4]

"8. The district engineer has considered the construction of levees and channel improvements to further alleviate flood damages in the Savannah River Basin, with particular attention to the South Carolina flood plain between Augusta and New Savannah Bluff, and finds that no works of that nature would be economically justified at this time. He also finds that prospective benefits would not justify the provision of reservoir storage space exclusively for flood control but that Clark Hill Reservoir, if suitably constructed and operated *primarily for hydroelectric power development*, would *incidentally* reduce downstream flood damages and improve low-water flows for navigation. Accordingly, the district engineer has considered the Clark Hill Reservoir and has formulated *a plan incorporating it with potential upstream hydroelectric power developments*. This plan includes four high-head developments on Chattooga River which the district engineer considers as one unit of the plan; four reservoirs on the main stem, which would develop all the main stem head above Stevens Creek, flooding out two existing low-head plants, namely Gregg Shoals on

[4] Emphasis is supplied throughout this brief.

Savannah River and Portman Shoals on Seneca River; one development on Keowee River; and two on Broad River.

"9. Data for the plants, if constructed and operated as a whole, are contained in the table below. This table is based upon generator capacities sufficient to produce the prime power *at 25-percent load factor,* sale of the power at the switchboard, and evaluation of the power on the basis of the cost of producing similar power by privately owned steam plants. The developments are arranged in the order in which the district engineer believes they should be undertaken. Data given are for the individual units except that the annual costs and power values represent the increases in the annual costs and annual power values which would result to the power system from the addition of the individual development to the preceding plants.

Development River	Clark Hill Savannah	Hartwell Savannah	Goat Island Savannah	Middleton Savannah	Chattooga Units Chattooga	Tallow Hill Broad	Anthony Shoals Broad	Newry Old Pickens Keowee
Miles above Bull St.	222.5	290.0	262.6	280.7	{ 348.2 { 363.6	} 292.7	261.6	335.7
Drainage, square miles	6,144	2,988	2,830	2,268	258	749	1,490	451
Full pool elevation	335	660	430	475		610	400	800
Usable storage in thousands of acre-feet	1,319	1,567	40	1.4	89	560	113	560
Gross head, feet	148	185	98	47	748	190	65	140
Prime capacity in kilowatts at 25-percent load factor	251,000	177,500	99,400	42,800	67,700	40,100	21,100	30,200
Installation, kilowatts	251,000	177,500	99,400	42,800	68,500	43,100	22,400	37,200
Annual output, in millions of kilowatt hours:								
Primary	549.9	388.7	217.7	93.7	148.2	87.8	46.2	66.1
Secondary	122.7	73.9	59.3	21.0	82.2	24.8	19.3	10.2
Estimated first cost, in thousands of dollars	36,436	33,339	14,025	6,321	16,597	15,190	7,034	11,477
Estimated annual cost, in thousands of dollars	1,772	1,759	714	323	808	725	343	520
Estimated annual value of power, in thousands of dollars	4,006	3,532	1,809	771	1,250	798	375	415
Ratio of annual power value to cost	2.26	2.01	2.53	2.39	1.55	1.10	1.09	0.80

this Court was invoked under 28 USCA 1954 (1). *Certiorari* was granted on January 10, 1955, 348 U. S. 910.

QUESTIONS PRESENTED

The Respondents contend that where concurrent findings of Commissioners, District Court and Court of Appeals have established as a fact that the potential use of the Twin City uplands for power purposes was, at the time of taking, so probable as to affect, and actually did affect, market value and the Courts below have awarded judgments for this actual market value as the "just compensation" required by the Fifth Amendment, this market value should not be denied the landowner because its properties lie along a stream which is subject to the power of Congress to regulate commerce between the States.

The Respondents also contend that the construction of the Clark Hill reservoir on the Savannah River under the provisions of the Flood Control Act of 1944 does not constitute an exercise of the public easement for navigation, but does represent the development of a large and valuable hydro-electric project, consisting of a solid dam and power house with no provision for locks or other navigation facilities. The United States has thus put the Twin City property to the very same use which gave it the market value found by the courts below.

STATUTE INVOLVED

The "Flood Control Act of 1944" enacted December 22, 1944, 58 Stat. 887, is the authorization for the Clark Hill Dam for which the property of Respondent has been taken.

HISTORY OF THE PROCEEDINGS

The United States instituted in the District Court for the Western District of South Carolina three suits taking the lands of the Twin City Power Company for use in con-

nection with its huge Clark Hill hydro-electric development. Contemporaneously it took the lands of Twin City's wholly owned subsidiary, the Twin City Power Company of Georgia, in proceedings instituted in the Southern District of Georgia. Unless otherwise indicated, Twin City, as used herein, refers to both corporations.

After motions filed by the United States to strike certain defenses were denied by each of the District Courts (*U. S. v. 1532.63 Acres of Land*, 86 F. Supp. 467, R. 1-14), the issues were referred to Commissioners. The report of May 14, 1953 (R. 14-47) found that the properties of Twin City "were peculiarly adapted for use as a site or as an integral portion of a site for a hydro-electric development by reason of their location in proximity to and along the Savannah River," and that this potential use had affected market value (R. 35). It found that this sound market value of the Twin City lands in South Carolina and in Georgia aggregated $1,257,033.00 and allocated this amount among the several tracts on an acreage basis (R. 40).

On objections filed by the United States and by Twin City pursuant to Rule 53(e)2, each District Court affirmed the material findings of the Commission and awarded judgments thereon (*U. S. v. 3928.09 Acres*, 114 F. Supp. 719, R. 47-55). Motions for new decrees were denied (R. 55-58).

The Court of Appeals for the Fourth Circuit on August 30, 1954, affirmed the judgments entered in the Western District of South Carolina (R. 138-148). *U. S. v. Twin City Power Company*, 215 F. 2d 592. The Court of Appeals for the Fifth Circuit on April 12, 1955, affirmed the judgments entered in the Southern District of Georgia. *U. S. v. Twin City Power Company of Georgia*, 221 F. 2d. 299. A petition for *certiorari* to the Court of Appeals for the Fifth Circuit is now pending, No. 209, October 1955 Term.

STATEMENT OF THE FACTS

A.

The Twin City Properties

Twin City Power Company was chartered by South Carolina in 1900. A special Act of the South Carolina Legislature in 1901 amended the charter to give it the right to construct dams across the Savannah at Price's Island and at Dorton Creek. 23 Stat. (S. C.) 862. Twin City Power Company of Georgia, a wholly owned subsidiary of the South Carolina corporation, was chartered under the laws of Georgia in 1901. Between 1900 and 1911 the two corporations, acting in accord, each on its own side of the river, acquired by purchase, under some ninety deeds, lands on both sides of the Savannah for a distance of eleven miles from Price's Island upstream to Chamberlain's Ferry. These purchases, for the purpose of assembling a unified site for the generation of hydro-electric energy, totalled 459.15 acres in fee and flowage easements over 220.5 additional acres. Twin City also acquired in fee a 30-foot strip of land about two miles in length from Modoc, S. C., on the Charleston and Western Carolina Railroad, to the proposed dam site at Price's Island and a 100-foot transmission easement some twenty miles in length from Price's Island to a substation site in North Augusta, S. C. All of the properties of both corporations are covered by a mortgage made to the Merchants Trust Co. of New York, as Trustee, dated January 1, 1901, in the amount of $1,000,000.00. (R. 22, 63-4, Exhibit 1, T. 103-6). At a later date William P. Dauchy was substituted as Trustee under this mortgage.

Six different Acts of Congress (1901-1919) authorized the construction by Twin City of dams across the Savannah at Price's Island and elsewhere on its properties. Engineering surveys and construction plans were made by it

during the years 1901-1922. These studies were kept current until after World War II. A railroad was graded and built from Modoc to Price's Island dam site about 1915. The grades were removed in 1937. The Secretary of War and the Chief of Engineers approved the Twin City construction plans in 1915 (R. 22, 91, Exs. 10, 11, 12).

The Twin City properties were considered for development in 1912 when a 30-foot dam was built downstream at Stevens Creek. In 1916, the United States studied the property as a site for the nitrate plant which was later located at Muscle Shoals on the Tennessee. Twin City optioned the property for hydro purposes to Messrs. Bell and Johnson in 1917. The Federal Power Commission tendered Twin City a preliminary permit for an eighty-foot dam at Price's Island in 1925, which permit Twin City declined because of its belief that the recapture clause of the Water Power Act was unconstitutional (R. 22, 51, 64-5, 133).

The Southeastern Power Company negotiated with Twin City for the purchase of the properties in 1926. The Savannah River Electric Company tried to acquire the properties by purchase and by condemnation; the period 1928-1932 when it had a Federal Power Commission license to construct a 90-foot development with a dam at Clark Hill, some six miles below Price's Island. Repeated surveys of this part of the Savannah River by the Army Engineers, by the Federal Power Commission and by the Department of the Interior between 1926 and 1947, all indicated its suitability for hydro-electric use (R. 51, 65-6, 102).

In 1946 and 1947 negotiations to sell were again had with the Savannah River Electric Company which had applied to the Federal Power Commission for a license to build at Clark Hill, substantially as the United States has now built. The inability of Savannah River to secure a license caused the breakdown of these negotiations. *Savan-*

nah River Electric Co. v. F. P. C. (1947), 164 F. 2d. 408. Thus, in June 1947, at the time of the first taking of Twin City property in these cases, both the United States and the Savannah River Electric Company were interested in acquiring the Twin City properties. Had a license been issued to Savannah River, it rather than the United States would have been the purchaser (R. 23, 51-2, 66, 70). The interest of private parties and the Government in the hydro-electric potentialities of this property is thus stated by the District Court (R. 51):

> All of the properties of Twin City and the entire eleven-mile stretch of the Savannah River along which this land lay have been incorporated by the United States in its Clark Hill hydro-electric development for water power purposes as its best and most valuable use. The testimony from both sides shows that during the entire period from 1901 to the date of taking Congress and all of the interested Federal agencies, without exception or dissent, considered that these properties of Twin City should be developed for water power, either by private interests or by the United States and either separately or in conjunction with other property. (R. 36, 102.)

The District Judge, in denying the Government's motion for a new decree, summarized the facts (R. 56-7) and the Court of Appeals adopted this summary (R. 139-141):

> The properties of the two Twin City corporations taken by the United States in these actions and in those pending in the Southern District of Georgia, extend some eleven miles along both sides of the Savannah River from Price's Island to Chamberlain's Ferry, embracing some forty-seven hundred acres. Along this distance the Savannah River has a sixty-foot fall and a stream flow exceeding that at most of the hydro developments in Georgia and the Carolinas. At Price's Island on the Twin City properties there was an excellent dam site between spurs with sound foundation

rock and ideal clay available for construction purposes (R. 49, 62).

Twin City's ownership of a strip of land for a railroad siding to the C. & W. C. Railroad some two miles away, the proximity of nearby transmission facilities, the ownership of a reservoir area free of houses, bridges, railroads and highways were factors materially minimizing construction costs. At the time of taking, conditions were favorable for the marketing of power.

Dams at the Price's Island site were economically feasible for use in connection with a sixty, seventy, eighty, ninety, or one hundred foot head. Twin City owned practically all of the land needed for the sixty-foot development and therefore an integrated site for such a project. These properties embraced one of the best undeveloped hydro sites in the eastern part of the United States (R. 25, 36, 50, 104, 132). This land was also useful for hydro-electric purposes in conjunction with up-stream and down-stream properties owned by others. The value of the Twin City lands would have been increased by upstream developments at Calhoun Falls and at Hartwell which were under consideration at the time of taking (R. 76-79, 84-6, 92-95).

The properties were under constant study for hydro-electric development from the time of the first acquisition for this purpose by Twin City in 1901. It was authorized to build dams in the Savannah River under six Acts of Congress enacted between 1901 and 1919. The Secretary of War and the Chief of Engineers approved its plans, the Federal Power Commission tendered Twin City a preliminary permit in 1926 for a development at Price's Island. From 1928 to 1932, the Savannah River Electric Company held a Federal Power License to build at Clark Hill and to incorporate the Twin City properties into its development. During the twenty-year period immediately preceding these condemnation proceedings the Army Engineers had this stretch of the Savannah under constant study in

connection with both private and public hydro-electric development. Finally in 1944, Congress decided that the project should be built by the United States and the Federal Power Commission therefore refused to issue a license for its construction to the private applicant, the Savannah River Electric Company. *Savannah River Electric v. Federal Power Com.* (1947), 164 F. (2d) 408.

These facts are largely undisputed. The great weight of the evidence supports the finding that this use for power purposes was so probable at the time of taking as to affect the market value of the property. The Government, having been attracted to the acquisition of this property because of its suitability for water power development, can hardly deny that the water power potential actually did affect its value in the market.

The amount of the award is supported by the preponderance of the evidence. Three competent and well qualified hydraulic engineers with large experience in this field, after fully considering all of the pertinent factors, testified that in their respective opinions a prudent, competent and well-informed buyer, willing but not compelled to buy, trading with an equally well-informed, competent and willing seller would have paid substantially more than the award for these properties (R. 32, 76, 84, 94). The Commissioners, evaluating all of the evidence, found that a figure, less than these given in these opinions, was just compensation and the two courts confirmed the aggregate of the awards in the companion decrees of August 26, 1953. On reconsideration I am convinced of the correctness of the findings in the decree.

The Court of Appeals for the Fifth Circuit approved the factual findings in this language (221 F. 2d, 299, 302):

> The findings of the district court based on the overwhelming weight of the evidence established the fact that these properties were adaptable and needed for water power purposes, and had been held by them

over the years for such use. They have been taken for and devoted to that use by the Government. No good reason exists why the land owners should be deprived of their full market value merely because they border on a technically navigable stream. On the contrary, considerations of justice and of constitutional right require that they not be so deprived.

Three Commissioners, two District Judges and two Courts of Appeal have found as a fact that the potential use of the Twin City properties for power purposes was so probable as to affect its market value. (R. 35, 50-1, 55-6, 57, 141; 221 F. 2d. 299, 302.) They have found that the amount of the award is the price which probably would have been reached in negotiations between a willing owner and a willing buyer. (R. 54, 57, 141.)

These factual findings were not questioned in the Court of Appeals (R. 139) and are not put in issue by the petition here.

B.

The Purpose of the Clark Hill Development

The uplands of the respondent[1] have been taken by condemnation by the Government for the construction of the Clark Hill dam and power house, which are located on the Savannah River about 20 miles upstream from Augusta, Georgia. The Clark Hill dam is at river mile 222.

At Clark Hill the Government has erected a dam extending across the Savannah valley from the hills of

[1] It is to be noted that these condemnation proceedings do not take the bed of the Savannah River. The United States has occupied and flooded the bed of the Savannah River but has not included it in the description of the lands taken and has paid no one for this acreage. No claim for compensation for this acreage (some 1,400) included in the bed has been made by Twin City. However, it is our view that, under Georgia and South Carolina law, the riparian owner's title runs to the center of the stream. *Stanford v. Mangin*, 30 Ga. 355; *Thompson v. Tennyson*, 148 Ga. 701, 98 S. E. 353; *Spivey v. Barwick*, 157 Ga. 853, 122 S. E. 594; *Johnson v. Watson*, 157 Ga. 349, 121 S. E. 229; *McCullough v. Wall*, 4 Rich (S. C.) 68; *Southern Power Co. v. Cassel*, 95 S. C. 465, 469, 79 S. E. 453, 454; *Wheeler v. Wheeler*, 111 S. C. 87, 96 S. E. 714; *State v. Columbia*, 27 S. C. 137, 146, 3 S. E. 55, 58.

Georgia to the hills of South Carolina. The dam rises to a height of more than 130 feet above the bed of the Stream. Both the Clark Hill dam itself, and the thirty-seven mile pond it created, are located principally outside of the river bed in and upon what were formerly fast lands. Thus these fast lands, forming a dam site and basin, are as important in this hydro-development as are the river and the water. Within the bed of the Savannah River itself no water power development is possible because neither head nor storage is available (R. 145). The United States was able to acquire a suitable water power site only by purchasing or condemning the fast lands owned by Twin City.

In the Clark Hill structure the Government has built a power house capable of generating 280,000 kilowatts of electrical energy. It has made no provision for locks or other navigation aids. The dam therefore constitutes an insuperable bar to navigation. The construction of the Clark Hill dam without locks is a positive determination by the United States that the public easement for navigation in the bed of the Savannah in this stretch has no commercial value and has been abandoned in favor of a more realistic use for water power development. *U. S. v. Twin City of Ga.*, 221 F. 2d, 299.

The Savannah valley, in this section, was peculiarly adapted to this purpose because the bordering hills formed an excellent basin, because the reservoir area was clear of towns, villages, bridges, highways, railroads, industrial plants and structures, the flooding of which would have made development costly, and because it was close to a fast growing market for power.

The lands taken from Twin City are fast lands. By taking these lands the Government became the owner of a water power site of great value which it did not own before. It has converted this into a huge hydro-electric develop-

ment from which it is now selling large quantities of electrical energy. The Chief of Engineers estimated that the sale of this electrical energy would yield the Government a very substantial profit since the ratio of annual power value to cost was 1 to 2.26 H. D. 657, 78th Cong., 2nd Session, p. 4.

The lower courts have found that these properties of respondent were adaptable and best suited for water power purposes at the time of the taking and that they had been acquired by Twin City for such purpose. They have been taken by the Government and devoted by it to the self-same use. (R. 141.)

There has been a small but declining amount of navigation on the Savannah River as far upstream as Augusta. H. D. 657, 78th Cong., 2nd Session, p. 61.[2] At Augusta there is the Augusta City dam, which diverts water into a canal for hydraulic power users. There is no navigable connection between the pool behind this 14 foot dam and the river below. H. D. 657, p. 20. Immediately above the Augusta dam and between it and the Clark Hill reservoir is the Stevens Creek dam, which is a hydro-electric development owned and operated by a privately owned public utility.

The congressional authorization for the Clark Hill project plainly indicated that it was to be "constructed and operated *primarily for hydro-electric power development*" the effect of which "would incidentally reduce downstream flood damages and improve low water flows for navigation". H. D. 657, par. 8. This congressional authorization also shows that the Clark Hill hydro-electric devel-

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[2] Water traffic below Augusta reached a maximum of 129,000 tons in 1937. It dropped to 56,000 tons in 1941. H. D. 657, p. 61. Figures available in the office of the District Engineers, Savannah, Ga., show an even lower volume in more recent years.

In 1951	35,950	Tons
1952	21,294	"
1953	39,447	"
1954	26,670	"

"10. If constructed as the first plant of the system, Clark Hill, with an initial installation of 223,000 kilowatts, has an estimated first cost of $35,300,000 and an estimated ratio of annual power value at the site to annual cost, *at 25-percent primary load-factor operation*, of 2.26 to 1.0. * * *

"11. With Clark Hill as the first reservoir of the system, its outflow during low-water periods with suitable power demand and average draw-down would be 6,040 cubic feet per second. However, *because of fluctuations in power demand* and less than average draw-down at times, the average flow at Augusta for considerable periods would not appreciably exceed 5,300 cubic feet per second. *Daily and weekly variations in power demand would result in lesser flows for short periods. To regulate the short-period outflows so as to provide more uniform flows for navigation, the Stevens Creek plant would need to be operated at 100-percent load factor. With Stevens Creek used as a reregulating pool* the increase in power value is estimated at $86,000 annually.

* * *

"16. After due consideration of these reports and the comments of the Federal Power Commission, *I concur in the views of the Board that the improvements proposed by the district engineer provide a suitable plan for the further development of the water resources of the basin* and that they should be authorized with Clark Hill as the initial development. The other developments should follow Clark Hill *when there is reasonable assurance that a suitable market is available for disposal of the power.* To safeguard the interests of navigation and flood control the dams and power facilities should be constructed, operated, and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers.

"17. *I accordingly recommend that the general plan of development outlined in the report of the district Engineer* be adopted as the basis for improvement, step by step, of Savannah river and tributaries

for power, flood control, navigation, and other purposes, and that the Clark Hill project be authorized for construction as the initial step, *generally in accordance with the plans of the district engineer* and my comments herein and with modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, at an estimated cost of $35,300,000 for construction and $223,000 annually for operation and maintenance.

E. REYBOLD,
Major General, Chief of Engineers."

Among the conclusions at the end of the report (p. 67) of the district engineer are the following:

"181. The district engineer recommends that a Federal project for the development of the water resources of the Savannah River and its tributaries be adopted to provide for (1) the construction of the Clark Hill development with full power pool elevation 330, as described herein, at an estimated cost of $35,300,000."

* * *

"(h) Owing to its *potential* value in providing additional depth for navigation below Augusta, $1,174,000 of the initial cost of the Clark Hill development may properly be allocated to navigation;"

* * *

"(f) Owing to the flood-control benefits *incident* to the normal operation of the reservoirs for power, $364,000 of the initial cost of the Clark Hill plant may properly be allocated to flood control;"

This gives a mathematical division of the importance of hydro-electric power, navigation, and flood control:

Purpose	*% Allocated*	*Cost Allocated*
Hydro-electric power	95 2/3%	$ 33,762,000.00
Navigation	3 1/3%	1,174,000.00
Flood Control	1%	364,000.00
	100%	$ 35,300,000.00 [5]

This explains in dollars and cents the statement in paragraph 8 of the report of the Chief of Engineers (H. D. 657) to the effect that Clark Hill should be built primarily for hydro-electric power development and that the benefit to navigation and flood control would be merely incidental.

It is important to consider what was meant in the various reports by the insistence of the engineers that the "Clark Hill power plant should be operated at "25 per cent primary load-factor operation". H. D. 657, pars. 152, 172-176, pp. 49, 64-5. It is explained in those reports that the plan of operation would be to pond the waters at the Clark Hill dam during periods of low power demand, stopping all of the flow of the river at such times. Then when the power demand came on, the water would be run through the wheels to satisfy that demand. Then the plant would once again be shut down and the water held back in the Clark Hill pond. A "25 per cent. primary load-factor operation" would mean, roughly, that during a calendar week the plant would run and would pass accumulated water for 42 hours and would be shut down with no water passage for 126 hours.

It is obvious that this form of operation would not be beneficial to navigation and the big problem of the Engineer Corps was to find out how to avoid interference with

[5] The breakdown of benefits on an annual basis as computed in 1953 is given in the testimony before a Congressional Committee by General Chorpening of the Corps of Engineers: "Flood control, $104,000.00; power, $7,616,000.00; navigation, $201,000.00; a total of $7,921,000.00. Percentagewise it is approximately one per cent for flood control, 96 per cent for power and three per cent for navigation." Hearings House Appropriations Sub-committee, 82nd Cong., Second Session—Civil Functions, Department Army, p. 322.

navigation below Augusta. The proposed solution was to compel the privately owned Stevens Creek plant to take this variable flow from Clark Hill and "re-regulate" it by running the Stevens Creek plant 100% of the time, even though this operation of Stevens Creek would sacrifice substantial hydro-electric values. H. D. 657, pp. 64-5. Thus the Clark Hill plant would be operated exclusively for power, while the Stevens Creek plant would be forced to put the river back in shape so that the navigation could continue.

The report of the Board of Engineers, H. D. 657, at pages 9 to 10, deals with the hydro-electric plans for the development of all of the water power in the upper Savannah River with little or no importance assigned to navigation. The comments of the Federal Power Commission, H. D. 657 at pages 7 to 9, deal almost exclusively with the power phases of the report. The Secretary of War's letter of June 6, 1944 in transmitting the reports of the Engineer Corps comments only upon the power features, making no reference to navigation.

This entire House Document 657 is dominated by the plans for 8 hydro-electric plants developing the water power in the entire river above Augusta.[6] The navigation below Augusta is mentioned merely as an incidental problem which would be solved in actual operation. One must conclude from an examination of this Document that the Clark Hill project was not a navigation project. Both of the courts of appeal have so held. (R. 143; 221 F. 2d.

[6] The Petitioner's brief (p. 5, 30, n. 15) claims support for its argument that the Clark Hill project is an exercise of the navigation servitude in S. D. 6, 81st Congress, 2nd Session. (1949) where a nine foot channel between Augusta and Savannah is recommended. An examination of that document shows that even if some benefit were obtained from the operation of Clark Hill, such benefit would not be adequate for commercial navigation. The solution proposed by the engineers was to obtain a practical nine foot channel through the expenditure by the United States of $3,137,000.00 which would be used on dikes to contract the width of the river, on wooden woven mattresses and rip rap to protect the banks, and on dredging. S. D. 6, pp. 1, 5, 27, 31, Par. 10, 79-84, 100.

299, 302). *Cf. Savannah River Electric v. Federal Power Comm.*, 164 F. 2d. 408; *U. S. v. Federal Power Comm.*, 345 U. S. 153, 170.

ARGUMENT

It is the Respondents' position that since the United States had no proprietary interest in the Twin City lands, it must, when taking these lands under its power to regulate commerce, pay the fair market value as just compensation. The right of Congress to exercise the public servitude in the interest of navigation does not justify the taking of uplands at less than their fair market value. Moreover, Congress has not in the Flood Control Act of 1944 attempted to exercise the public easement of passage but has developed the river for hydro-electric purposes.

I

The Government had no proprietary interest in the property condemned. It had only the Governmental power, derived from the Commerce Clause of the Constitution, to regulate the navigation easement or servitude in the interest of interstate commerce.

No evidence was offered indicating any proprietary interest of the United States in the lands or other property rights in, on or along the Savannah River. None of this area was ever a part of the public lands of the United States. No claim has been asserted on behalf of the Government that it owned any of the uplands, the river bed, the water, or the water power. The Government takes the position that its interest is based solely upon the governmental power conferred by the Constitution "to regulate commerce among the several states". This is a governmental power comprehending no property interest. The

grant of power to "regulate commerce among the several states" cannot be treated as a conveyance of title to real estate.

The claim is made that a public easement or servitude for the benefit of navigation existed in the Savannah River and that under the interstate commerce clause the Government had certain regulatory powers over this easement. The very fact that an easement exists indicates that the ownership rests elsewhere. It is significant that no evidence was offered that the Savannah River above Augusta has ever been used for commercial navigation or that it was capable of any such use in its natural state.

We recognize that under *United States v. Appalachian*, 311 U. S. 377, the Savannah River above Augusta was of such size and volume that it would be considered technically as "navigable" since, with the expenditure of a very considerable sum of money, it might have been made suitable for commercial navigation. As we read the *Appalachian case*, it holds that in such a river there exists a navigation potential, an easement for the benefit of future navigation and that, owing to the possibilities of interstate commerce on the river, the Federal Government has the governmental power under the Constitution to regulate the enjoyment and use of that navigation easement.

However, the Government has constructed the Clark Hill dam and power house as a solid and complete obstacle to any navigation in the river in this stretch. This was done under the specific authorization of Congress as a part of a plan which provided for seven more solid dams upstream devoted to the development of water power without any navigation facility. Thus, Congress and the governmental agencies involved have determined that any navigation potential in the Savannah River above Augusta had no practical value, that it was not worth the expenditure

of any money and that the entire river above Augusta should be devoted to the development of hydro-electric power by means of dams and power houses.

While we do not question the right of the Federal Government to erect the Clark Hill hydro-electric plant, it has no special right or privilege in the river and must acquire by purchase or condemnation any property which it wishes to use and pay therefor its fair market value. *United States v. Great Falls*, 112 U. S. 645, 656-7; *Monongahela v. United States*, 148 U. S. 312, 336. Its only claim in the Savannah River above Augusta is under the interstate commerce clause to regulate the navigation potential. This it has extinguished by its own act in devoting the river to hydro-electric development to the absolute exclusion of navigation. It has thus extinguished the only basis upon which it made any claim. In substance, Congress and the Government officials have converted this river from one which had a navigable potential to one which is non-navigable.

Because of basic physical facts, water power can be developed only by the riparian owner. The dam and its pond both must extend into the upland. Moreover, throughout the history of England and also of this country down through the end of the 19th century, the water power could be used only by the riparian owner, because it could be transmitted only as far as belts, shafts and pulleys could carry it. Its development and use were thus tied to the riparian land on both sides of the stream, and throughout the history of both countries, the riparian land suitable for water power development became endowed with a special value because thereof. It was bought and sold at a price measured by the power possibilities.

The private development of water power was of vital importance to the economic existence and growth of this

country during the 17th, 18th and 19th centuries, because it represented almost the only source of mechanical power for saw mills, grist mills, textile plants, paper mills, until the advent of steam in the latter half of the 19th century.

In 1830, Chancellor Walworth, in considering this subject remarked, *Canal Commissioners v. People*, (N. Y. Supreme Court) (5 Wend. 447):

> "It must be recollected it had not then been discovered that these rivers were made for the purpose of feeding canals. It was even more important here than in England at that time to assign the property of the stream to the owners of the adjacent lands, to enable them to construct dams and erect mills for the benefit of settlers in a new country."

While the public might properly be interested in the right to navigate the rivers, the development of water power was recognized as necessarily a private activity. At common law the right of the riparian owner to use the power was recognized as a property right appurtenant to the land. He did not own the water any more than he owned the air over his land, but he did own the right to use it as it went by.

Early in the 19th century came the era of inland water navigation. *Bona fide* navigation projects collided with the rights of the private water power owners and the public navigation easement in the bed of the stream was held to prevail to the extent, but only to the extent, of actual conflict.

With the 20th century came inventions and progress in the art of generating electrical power and transmitting it over long distances. Water power development is still limited to the riparian owner. The water still must be converted into electricity on the riparian land by means of water wheels and generators. But now it can be distributed over very considerable distances to many users.

But these inventions of the 20th century do not change retroactively the law which has been the backbone of our industrial development for three centuries. The easement of the public to use the stream for passage should not be expanded to allow the Government to seize from the riparian owner the water power which has always been held to be appurtenant to his land.

Though Congress, by law and by its acts, has found the possibility of navigation on the Savannah River above Augusta to be of no value and to be worthy only of obliteration, nevertheless, the Government asks this court to hold that this extinguished possibility gives it the privilege of taking water power sites without paying for them. For this plea there is no basis in law or in equity. It is directly contrary to the law of real property established for centuries in this country and in England. The unused easement of passage may not thus be converted into ownership of the fee.

In *Seattle v. Oregon Ry. Co.* (1921), 255 U. S. 56, 63, Mr. Justice Brandeis pointed out that the "right of the United States in navigable waters within the several states *is limited to the control thereof for purposes of navigation*".

In *U. S. v. River Rouge Imp. Co.* (1926), 269 U. S. 411, 417, the United States condemned portions of the Improvement Company's lands along the navigable Rouge River under the Rivers and Harbors Act of 1917 which provided *inter alia* that where a part of a parcel of land was taken in connection with a river improvement the jury should take into consideration any special and direct benefit to the remainder of the parcel.

The trial court refused to charge the Government's request that a "riparian owner bordering on the new stream should have in respect thereto the usual rights of navigation pertinent to riparian property", including the

right of access to deep water, to build landings, docks and piers, "subject only to such general rules and regulations as the Government, in its power over navigation, might properly impose for the protection of the public right of navigation; that this power of the Government 'over navigation for the protection of public rights cannot be arbitrarily or capriciously exercised so as to destroy these riparian rights * * *'". (269 U. S. 417-418.) On the contrary the court charged that the rights of the riparian owner to use this deepened channel were much more limited.

This Court reversed, holding (p. 419):

> "(The United States) may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no *real* or *substantial* relation to the control of navigation or appropriation to that end. In *Yates v. Milwaukee*, 10 Wall. 504, 19 L. Ed. 986, it was said in reference to the right of a riparian owner on a navigable stream: '*This riparian right is property and is valuable*, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.'"

In *Kansas v. Colorado*, 206 U. S. 46, the United States endeavored to assert the right to control the Arkansas River for irrigation purposes. This right was denied by the Court. While Congress has the power under the commerce clause to control navigation, this power is subject to the requirement of the Fifth Amendment that just compensation be paid any landowner whose property is taken. *U. S. v. Cress*, 243 U. S. 316, 319-20.

II

Where the potential use of the fast lands of Twin City was, at the time of taking by the United States, so probable as to affect market value, the just compensation required by the Fifth Amendment is that market value as so affected.

The effect of the water power site value upon the market value of respondent's lands was very real and actual. The testimony shows (R. 64-66 and R. 70) that the Savannah River Electric Company sought to buy respondent's property for power development between 1926 and 1932, first by negotiation and then by condemnation. Again the same company sought to acquire it in 1946-1947, just at the time condemnation proceedings were instituted by the Government. Objection was made by the Government to any testimony as to the prices offered by the Savannah River Electric Company for respondent's property so that those amounts are not in the record. (R. 65.)

Respondent's property was an integrated site suitable for the development of water power. This made it attractive to a purchaser having the money and the legal qualifications to develop the property. It was this feature that attracted claimant to buy the property fifty years ago. It was the same feature which caused the Savannah River Electric Company to seek to buy the claimant's property in 1926 and again in 1947. It was the same feature which impelled the Government to take all of claimant's property by these condemnation proceedings. Suitability for water power development has been the controlling factor in the market value of this property for nearly half a century. (R. 57, 141.) The uncontradicted evidence showed that a prudent, competent, well informed and willing buyer would

have paid an equally prudent, competent, well informed and willing seller for this property a price which included a consideration of this power potential. (Creager, 75-79; Johnson, 84-87; Courtenay, 92-96; Logan, 132.)

How can the Government deny that the suitability of our property for water power development gave it a special attractiveness in the market when the Government itself took our property for that very purpose and proceeded to devote it to that same use?

Three Commissioners, two District Judges and two Courts of Appeal have found *as a fact* that the suitability of the Twin City properties for water power purposes very markedly affected their market value. The evidence to this effect was overwhelming and indeed was not and is not now seriously contested by the Government. We are in this Court with a finding of fact that this market value was an actual market value which the respondent would have obtained in the open market had the Government not intervened to take the property. Another bidder actually stood ready to buy if the Government had not taken.

"In a voluntary purchase of this land by the petitioner as a willing purchaser, from the respondent as a willing and unobligated seller, the value of it as a power site inevitably would have entered into the negotiated price." *Grand Dam v. Grand Hydro*, 335 U. S. 359, 372-3.

In that case the Court sustained an award based on dam site and power potential in favor of a private corporation in a condemnation proceeding by a Federal Power Commission licensee on evidence of the character submitted here. Incidentally, the *per acre* award there was more than twice that made to Twin City. While the proceedings there were in the State Court, a Federal question was present because of the Federal Power Commission license and be-

cause the condemnor took the position that the Federal Power Act had so far affected the use of the land for a power site as to render it valueless for that purpose. The Court answered that position in this fashion:

> "Under this interpretation of the state law the answer to the remaining federal question is obvious. It is clear that the Federal Power Act cannot be said to have so far affected the use of this land for a power site as to destroy or otherwise render valueless the owner's right to use it for that purpose. That Act merely has attached conditions to the use of the land for a power site. *The Act seeks to encourage rather than to prohibit the development of power sites.* It seeks to preserve or enhance, not to destroy, their value as such. While the Act has limited the time and manner of the use of this particular land for a power site, the Act has left great benefits available to the owner from such a use of the land. The present large development of this site by the petitioner under a federal license is convincing proof of the value and availability of the land for that purpose."

In *U. S. v. Powelson*, 319 U. S. 266, 275, (1943) the Court, while reversing an award because profits from a proposed enterprise could not be considered as the measure of just compensation for the lands and because North Carolina's grant of the right of eminent domain was not a compensable property right, recognized that the landowner was entitled to the market value of these riparian lands fairly determined.

In that case this Court said:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined'. *United States v. Miller*, 317 U. S. 369, 374. * * * That value may reflect not only the use to which the property is presently devoted, but *also that use to which it may be readily converted.* [Citing *Boom Co. v. Patterson*, 98 U. S. 403; *McCandless v. United States*, 298 U. S. 342.] In that connection the value may be determined in the

light of the special or higher use of the land *when combined with other parcels;* it need not be measured merely by the use to which the land is or can be put as a separate tract. *McGovern v. New York*, 229 U. S. 363. * * *

* * *

This is a case of first impression. No precedent has been advanced which suggests that a *different* measure of compensation should be required *where the United States rather than the state is taker* of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a *different* measure of compensation in such a case."

In *Olson v. U. S.*, 292 U. S. 246, (1934), the United States, under a treaty with Canada, condemned flowage easements over privately owned lands bordering the Lake of the Woods, which lake was located partly in Minnesota, principally in Canada, in aid of a Canadian dam across the outlet of the lake. The Court refused compensation based on a consideration of the adaptability of the land for reservoir purposes because the development of the property for this purpose was too improbable to affect market value. However, the Court recognized the principle that if this potential had in fact affected market value, it would have been considered in determining just compensation. 292 U. S. 259-260.

These decisions, recognizing that power potential which actually affects market value must be given consideration on the issue of just compensation, are consistent with the general principles established by the Court, which may be fairly summarized in the following manner:

Private property shall not be taken for public use without just compensation. (Fifth Amend. to U. S. Const.). "Just compensation" means the full and perfect equivalent in money of the property taken (*Monongahela v. U. S.*, 148 U. S. 312, 324). The practical standard by which Courts

determine this equivalent is to award to the owner the "market value of the property fairly determined." (*U. S. v. Miller*, 317 U. S. 369, 374). This market value is of the time of taking. It may be more or less than the cost to the owner of his investment, since the owner may have made a good or bad bargain and the value of the property may have changed since its acquisition. (*Olson v. U. S.*, 292 U. S. 246, 255). Compensation to the owner should reflect not only the use to which it is presently devoted but also that use to which it may be readily converted. (*U. S. v. Powelson*, 319 U. S. 266, 275). This value may be determined in the light of the special or higher use which the land has when combined with other parcels. (*McGovern v. New York*, 229 U. S. 363; *U. S. v. Powelson, supra*). "The highest and most profitable use to which the property is adaptable and needed or likely to be needed in the near future is to be considered not necessarily as a measure of value but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." (*Olson v. U. S.*, 292 U. S. 246, 255). Since the just compensation required by the Constitution is measured by the owner's loss, the amount of the award is the same regardless of whether the taking is by the United States, by a State, or by a private corporation. (*Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195; *U. S. v. Powelson*, 319 U. S. 266, 287; *Kimball Laundry v. U. S.*, 338 U. S., 1, 13; *U. S. v. Causby*, 328 U. S. 256, 261).

No good reason exists as to why this market value should be denied or diminished because the probable use is in connection with a river subject to congressional regulation under the commerce clause At times real property derives its value from fertility, or from mineral wealth beneath its soil, or from improvements thereon, but usually

its market value is derived from its proximity to property of others, or to highways, or to population centers. Property abutting upon a busy street derives most of its value from that location. That value is unaffected by the control which the city has over the street, including the power to limit the type of traffic, to specify the direction of traffic, to change the grade, to widen or narrow the sidewalks, to close the street on occasion, or to do many other acts which may unfavorably affect the use of the abutting owner's land. Yet the property on busy streets still sells at a high market value because of its location on such a street. So in the case of the Savannah River the market value of the water power site owned by Twin City is not destroyed by the fact that the Federal Government may have some control over the river in the interest of a public right of passage.

Many decisions of this Court sustain the proposition that the adaptability of high ground adjacent to rivers for use with the water of the river must be considered if the potential is so probable as to affect market value.

In *Mississippi and Rum River Boom Co. v. Patterson*, 98 U. S. 403 (1897) the right of the riparian landowner to have the adaptability of his shore lands and islands for storing logs in the Mississippi River considered as an element of value was sustained.

In *Monongahela v. U. S.*, 148 U. S. 312, 337-8 (1893) the United States was required to pay the landowner for the value of a state navigation franchise though the property was on a navigable stream and was being taken in furtherance of navigation improvement. "So * * * while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation."

The main reliance of the Government is upon the case of *U. S. v. Chandler-Dunbar*, 229 U. S. 53 (1913). The broad language in that case has led to a misunderstanding as to its significance. The very limited meaning of the decision has been clearly pointed out by this Court in its opinion in the *Niagara Mohawk case*, 347 U. S. 239, 249-250.

The *Chandler-Dunbar case* arose under an Act of Congress of March 3, 1909 which provided for a large and important navigation improvement. There was no reference whatever to water power or flood control or any other purpose. It concerned the navigation on the Great Lakes and the passage of the water traffic through the St. Mary's River. That Act declared:

> "Sec. 11. * * * the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Mary's Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.
>
> "The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all of said lands and property of every kind and description, in fee simple absolute. * * *
>
> "Every permit, license, or authority of every kind, nature and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company * * * shall cease and determine and become null and void on January first, nineteen hundred and eleven * * *" *35 Stat. 820, 821.*

This Court found that, by this Act, Congress determined that *the entire flow of the stream* should be devoted to navigation purposes to the exclusion of any water power

use. This eliminated any possibility of water-power development. The Court said (page 66-67):

> "That Congress did not act arbitrarily in determining that 'for the purposes of navigation of said waters and the waters connected therewith', *the whole flow of the stream should be devoted exclusively to that end*, is most evident when we consider the character of this stream and its relation to the whole problem of lake navigation. The river St. Mary's is the only outlet for the waters of Lake Superior. * * *"

The Court then proceeds to review the facts in regard to the magnitude and growth of navigation on the Great Lakes. There was no mention whatever of any development of water power by the Government. In every particular the action of Congress was directed toward the exercise of an easement of navigation and the assertion of the navigation servitude was direct and specific. As all of the water of St. Mary's River and all of the land in the river was needed for potential navigation, and since Congress was about to embark on improvements in the river to facilitate that navigation, Congress had the right to exercise the public easement in the water and in the bed of the stream in the interest of navigation.

The entire flow of the stream was required for navigation purposes, therefore no part of that flow remained for water power. Consequently, the upland had no special value for industrial use in connection with water power because there was no water power available. In our case the situation is exactly the reverse of that in the *Chandler-Dunbar case*. Navigation has been eliminated by the Clark Hill dam and power house and the entire flow of the Savannah River has been devoted to the production of hydro-electric power.

Moreover, this court sustained an allowance to the Chandler-Dunbar Company for the value of its land for lock and canal purposes. The Court said (pages 76-77):

> "The exception (of the United States) taken to the inclusion as an element of value of the *availability of these parcels of land for lock and canal purpose must be overruled.* That this land has a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."

Here in the case principally relied upon by the Government is the definite decision that the market value of *riparian* lands along a navigable waterway taken by the United States should include the value of the *potential use of the land with the waters of the stream* for canal and lock purposes. This value was included, because the use of the land for canal and lock purposes was reasonably probable at the time of taking. In fact, that was the purpose for which the Government took the land. In the *Twin City case* the District Court found that the use of our property for water power development was reasonably probable at the time of taking. The Government actually took the property for the purpose of devoting it to that specific use.

In *Ford v. Little Falls Fibre Co.*, 280 U. S. 369 (1930), Ford obtained a license from the Federal Power Commission to generate power from surplus water at a Govern-

ment dam on the navigable Hudson River. The license permitted but did not require flashboards which raised the pond level two feet. In maintaining these flashboards Ford backed water on the tailrace of Little Falls Fibre Company's dam on the navigable Mohawk, with a resulting reduction of head and of power generated. The New York Court enjoined and the United States Supreme Court affirmed, holding that the Water Power Act did not authorize these water rights to be taken without compensation.

Since the United States argues that it need not pay compensation based on the potential use of the Twin City lands for power purposes because of the right of the public to use the Savannah River in the interest of navigation, it is appropriate to ascertain the nature and extent of this servitude.

When the United States uses the *bed* of a navigable stream *in the interest of navigation* it need not pay because it is exercising the paramount power of the public for this navigation purpose. *U. S. v. Kansas City Ins. Co.*, 339 U. S. 799, 804. The *rationale* of that rule is well expressed in this case:

> "It is not the broad constitutional power to regulate commerce, but rather the servitude derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The Owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation."

Because of this servitude in the bed of a navigable stream in the interest of navigation and because the Congress had expressly exercised this servitude, in *U. S. v. Willow River Power Co.*, 324 U. S. 499, the United States

was not required to pay for the reduction in the generating capacity of an upstream plant resulting from a real navigation improvement; in *U. S. v. Chicago, M., St. Paul & P. R. Co.*, 312 U. S. 592, it was not required to pay for land in the stream bed below high water mark; and in *U. S. v. Chandler-Dunbar*, 229 U. S. 53, 74, it was not required to pay for the raw water of the St. Mary's River. All of these decisions are based upon the constitutional power of the United States under the commerce clause plus the *express determination* by Congress to exercise, in the interest of practical navigation, the public navigation servitude in the *bed* of a navigable stream.

However, the United States is not relieved from paying the market value for the Twin City lands above high water mark. The navigation servitude does not extend beyond the bed of the stream. In this case the respondent has actually made no claim for the 1400 acres of land in the bed of the river, which we believe it owns under the laws of South Carolina and Georgia. Its claim is based upon a taking by condemnation of its uplands for which full compensation must be made. The soundness of this view is shown by the decision in *United States v. Chicago, M., St. Paul & P. R. Co.*, 312 U. S. 592. There the United States took property of the railroad, some above and some below normal high water. The improvement was admittedly in the interest of a real navigation project. This Court denied recovery for the lands in the bed of the navigable Mississippi but authorized compensation for that above high water. This principle has been applied when there is damage to the fast lands because of interference with subsoil drainage by reason of a Federal navigation improvement,

even though the improvement is limited to the bed of the stream. *U. S. v. Kansas City Ins. Co.*, 339 U. S. 799, 804.[7]

III

The construction of the Clark Hill Project under the Flood Control Act of 1944 is not an exercise of the public easement for navigation but represents a large and profitable hydro-electric development.

We have reviewed heretofore in this brief the Congressional authorization for the Clark Hill dam and power house. The Act of 1944 does not mention navigation in its title. The section authorizing Clark Hill refers to the "Savannah River Basin". It makes no use of the word "navigation".

The report of the Chief of Engineers, which is adopted and approved by Congress in the Act of 1944, states that the Clark Hill dam and power house shall be designed "*primarily* for hydro-electric development" but that it "would *incidentally* reduce downstream flood damages and improve low water flows for navigation." That plan also includes seven other hydro-electric developments in the Savannah River above Clark Hill with no navigation facilities of any kind.

In this case Congress very honestly has made no pretense that this was intended as a navigation improvement. It authorizes Clark Hill as a hydro-electric development with no attempt at deception or subterfuge. Not only is there no positive and direct declaration of intent to exer-

[7] The consequential damage cases, such as *Gibson v. United States*, 166 U. S. 269, *Scranton v. Wheeler*, 179 U. S. 141, and *United States v. Commodore Park*, 324 U. S. 386, have no application where there is a *taking*. Frequently the United States in the exercise of one of its powers causes damages for which there can be no recovery. We have no issue here as to whether Twin City lands are damaged or taken. The latter is conceded.

cise the navigation servitude for a navigation improvement, but there is, in fact, a contrary intent indicated. The statute recites the policy of Congress "to recognize the interests and rights of the States" in determining watershed development and "their interests and rights in water utilization and control" so as to "preserve and protect to the fullest possible extent established and potential uses, for *all* purposes". (Pet. Brief, p. 2.) Referring back to the first paragraph of the Flood Control Act of 1944, we find the following language:

> "* * * it is hereby declared to be the policy of the Congress * * * to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers *by other users.*" (Pet. Br., p. 3.)

The Clark Hill project was erected without any "navigation works" indicating that no "substantial benefit to navigation" would be realized therefrom. Instead of declaring its intention to seize the river for a dominant navigation purpose, Congress declares a policy directly contrary in saying that navigation works should not be constructed which would interfere with "appropriate and economic use of the waters of such rivers *by other users.*"

We submit that this case presents a situation similar to that involved in *United States v. Gerlach Livestock Co.*, 339 U. S. 725, where this Court held that, in spite of general references to navigation purposes, "Congress realistically elected to treat it as a reclamation project." In that case this Court reviewed the subject very carefully with a study of the authorities. In our case Congress "realistically" treated this Clark Hill development as a hydro-electric development, because the navigation feature was of no substantial importance.

In *International Paper Co. v. United States*, 282 U. S. 399, the Government during the first World War took over under its war powers the electrical power which was being generated under water rights in the Niagara River by the International Paper Co. This Court held that the Government was not proceeding under any navigation easement nor in the interest of navigation, but was exercising the power of eminent domain for the purposes of prosecuting the war and therefore must pay for water rights.

Similarly, in *Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U. S. 239, 249, the question was whether money paid by Niagara Mohawk, a Federal Water Power Act licensee, to International Paper annually for use of its water rights in the Niagara River could be charged as a proper expense to be deducted by Niagara Mohawk in determining its amortization reserve. This Court held that Niagara Mohawk was entitled to credit for such payments, which increased to that extent the option price which the United States must pay the licensee if at a later date it exercised its right to recapture under the Federal Water Power Act. The Court said:

> "We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them.
>
> "While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams, we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization."

As pointed out in the *Gerlach case*, an *incidental* navigation benefit is not enough to support the "clear author-

ization" by Congress to take riparian rights without compensation.[8]

Another reason why the Court should conclude that Congress did not exercise the navigation servitude at Clark Hill in the Flood Control Act of 1944 is that there is no claim of a navigation benefit in the stretch of the river above Augusta. The right of the United States to take without compensation under the servitude is narrowly construed. *U. S. v. Kansas City Insurance Co.*, 339 U. S. 799, 804; *Federal Power Commission v. Niagara Mohawk*, 347 U. S. 239, 249. The decisions of the Court permitting the exercise of the navigation servitude and therefore freedom from compensating the owner all deal with a navigation benefit in the stretch of the river actually improved. None applied to a navigation benefit in a river miles downstream from the improvement. To extend the right of the United States to take properties on the headwaters of a stream without compensation because of some incidental benefit in regulating downstream portions of the river would extend the doctrine well beyond the holding of the present decisions. The easement for navigation is an easement of passage and cannot be used for the expropriation of distant, riparian rights.

Congress and the Federal Power Commission can undoubtedly restrain upstream owners from so modifying the river flow as to interfere with navigation below, but

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[8] The United States urges (pp. 30-31) that since the general language of the statute refers to "improvement, for *navigation* or *flood control*" the Court may not inquire into whether there is a real navigation improvement justifying a taking without compensation, citing *Arizona v. California*, 283 U. S. 423, 456-7. When the Court inquires into the issue of the power of Congress to enact a statute, it must, in deference to the legislative branch of the Government, indulge in a presumption of constitutionality. But when the issue is whether the Congress has exercised the much narrower servitude for navigation there is no such presumption and the Court must not close its eyes to the realities of the case. *United States v. Gerlach*, 339 U. S. 725; *Ford v. Little Falls Fibre Co.*, 280 U. S. 369; *Federal Power Comm. v. Niagara Mohawk*, 347 U. S. 239.

this does not mean that the United States may take over and develop upstream water power sites without paying for them, especially where such a hydro plant not only provides no navigation facilities but actually makes the river incapable of navigation at that point. The Federal Government may enter upon such a project, if it chooses so to do, but it must pay full value for the property it takes for the purpose. It may not plead, as an excuse for not paying, an easement of passage of downstream waters.

IV

The fact that the Federal Power Commission would not license for private development either the Price's Island site or the Clark Hill site, because the Government had determined to develop the power itself, does not in any way affect the market value of our property.

The Government argues (Br. pages 36-38) that once the Government had decided to develop the water power in this portion of the river there was no prospect for respondent to procure a license from the Federal Power Commission to build a development at Price's Island. It argues that therefore the Twin City lands had no potential for power purposes which could affect their market value.

If an owner may not himself devote his property to its most valuable use because of the lack of a license or the necessary finances or other reason, he may sell his property to one who can develop it. Thus, he will realize its "market value" from someone who is in a position to put the property to its most valuable use. The market value of the property as a water power site is not lost so long as the property is to be devoted to water power purposes.

In this case the lower courts have found (R. 51) that there was never any question at any time that respondent's property was to be devoted to water power.

The Federal Power Commission may determine who shall develop the water power and how much of the river shall be included in one development, but the licensee must then buy and pay for the property needed. *Ford v. Little Falls Fibre Co.*, 280 U. S. 369; *Grand Dam v. Grand Hydro*, 335 U. S. 359; *Federal Power Commission v. Niagara Mohawk*, 347 U. S. 239.

The fact that the Federal Power Commission in 1944, or in 1947 had come to the conclusion that a hydro-electric project larger than that contemplated by Twin City represented the best development of the 37-mile stretch of the Savannah which included the 11 miles owned by Twin City, did not destroy its power value. The Respondent's testimony developed the fact that the Twin City properties with a 60-100 foot dam at Price's Island could be economically developed for power purposes (R. 75-79, 84-87, 92-96). The Government offered no testimony to contradict this showing (R. 104, 117, 132) but did undertake to show that by going downstream and building a 130-foot dam at Clark Hill an even better water power development could be had. (Farley, R. 104.) Over the years the Federal agencies have reached varying conclusions as to the best development of these resources. (R. 104-105.)

On the basis of the record, the Courts below properly found that the use of the Twin City properties for power purposes represented its best and most profitable use, whether this development involved only Twin City lands or whether its use was in conjunction with property owned by others. (R. 49, 51, 56-7, 139-141.) That the best use requires combining with the property of others does not destroy this value. *McGovern v. New York*, 229 U. S. 363.

The fact that property may be developed profitably, not only by itself but also in conjunction with the property of others makes it more valuable rather than less valuable. (R. 148.) The fact that the United States elected to build rather than to license the construction to private parties is immaterial. *United States v. Powelson*, 319 U. S. 266, 287.

V

Conclusion

Concurrent factual determinations by the Courts below have established the market value of this property as the "just compensation" to which Twin City is entitled. Consistent with the decisions here, they have applied the law requiring a showing of actual effect on market value of this power potential. While the Court has not passed on actual facts identical with those in this case, we believe that the judgments of the District Courts, affirmed by the Courts of Appeal, are supported by the reasoning of the decisions cited.

Respectfully submitted,

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